Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

JOINT APPENDIX

FRED M. GOLDBERG
JONATHAN D. GOLDBERG
GOLDBERG & SIMPSON, P.S.C.
2800 First National Tower
Louisville, Kentucky 40202
(502) 589-4440
Counsel for Petitioner

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL
& STAMPER
715 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-2100
Counsel for Respondent

PETITION FOR CERTIORARI FILED JANUARY 26, 1981.
CERTIORARI GRANTED MARCH 30, 1981.

JOINT APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

CONTENTS:

	PAGE
Press Conference, Carl Brown and William Creech, August 14, 1979	1– 3
Press Release, Carl Brown and Dr. Bill Creech, August 19, 1979	4– 5
Certificate of Election, Jefferson County Board of Election, November 27, 1979	7
Petition to Void Election, Jefferson Circuit Court, Filed December 4, 1979	9– 11
Answer of Defendant Carl Brown, Jefferson Circuit Court, Filed December 31, 1979	12–15
Amended Answer	16–17
Findings of Fact, Conclusions of Law, and Opinion, Jefferson Circuit Court, February 6, 1980	18–26
Judgment, Jefferson Circuit Court, Filed February 12, 1980	27–28
Court of Appeals of Kentucky, Commonwealth of Kentucky, Opinion and Judgment Reversing Jefferson Circuit Court, Filed August 8, 1980	29–37
Opinion and Order Denying Motion for Rehearing, Court of Appeals of Kentucky, Commonwealth of Kentucky, Filed October 29, 1980	38–40
Order Denying Discretionary Review, Supreme Court of Kentucky, Commonwealth of Kentucky, Entered December 9, 1980	41
Stay Order, Court of Appeals of Kentucky, Commonwealth of Kentucky, Entered December 10, 1980	42
Stay Order, Court of Appeals of Kentucky, Commonwealth of Kentucky, Entered December 16, 1980	43
Order of Substitution of Counsel, Court of Appeals of Kentucky, Commonwealth of Kentucky, Entered December 16, 1980	44
Stay Order, Supreme Court of the United States, By Associate Justice Stewart, Entered February 18, 1981	45

FOR RELEASE AUGUST 15, 1979

10:30 am

Press Contact: Steven Mobley 584-7111

PRESS CONFERENCE

August 14, 1979

BILL: As we stand here beneath the statue of George Rogers Clark, we are reminded of the spirit that guided our forefathers: the spirit that encompassed the ability both to conserve limited resources and to take bold steps when decisive action was required.

CARL: Unfortunately, it seems that the strength of this spirit has grown somewhat weak with the passage of time. With few exceptions, there has been little to illuminate the halls of our public institutions, only sparks resulting from the friction of discord. More often than not, we have been subjected to officials who merely offer lip service to austerity, while stuffing their wallets and taking incredible liberties with our tax dollars. The raises the county commissioners have given themselves in recent years and, even more recently, their hiring of an "executive assistant" are two cases in point.

Recent debate over the salaries of the County Police and other county employees has uncovered the widely-held belief that county employees are underpaid. There are, however, three part-time county commissioners. With state law limiting their authority and responsibility to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves

the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments. The intolerable salary increases began three years ago under Hollenbach, with the persistent efforts of Commissioner Hartlage to elevate his own office. At a fiscal court meeting in 1976, Hartlage led a surprise move to abolish an office created by Hollenbach and more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrepect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system. In typical neanderthal style, using the grey fringes of the law for his own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets.

BILL: Subsequent county commissioners have implied approval of this ridiculous arrangement by making no move to change it. They ignore the fact documented by the Kentucky Association of Counties, that Jefferson County is the only county in the entire state that pays its part-time fiscal court members the same salary as that paid our full-time county judge.

We abhor the commissioner's outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year.

The current commissioners' wasteful tendencies extend beyond their own salaries. Their creation of the $34,000 a year post of executive assistant reflects further fiscal extravagance and a tendency to overstep their legal authority. The position is nothing more than a thinly disguised political campaign manager paid with public funds. It will be abolished as soon as we take office.

In its place, we will organize a staff composed of three legislative assistants, one for each commissioner, as well as the necessary clerical staff. Instead of having *one* lavishly paid assistant trying to serve *three* masters who have widely divergent views, we will have three legislative assistants who will assist the respective commissioners with budget and legislative review, the proper responsibilties of the commissioners. An idea staff set up, it can be implemented by using the dollars currently allotted to the commissioners' office and slightly readjusting staff responsibilities.

CARL: These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

Under our guidance, extravagance at public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme.

PRESS RELEASE
August 19, 1979

Dr. Bill Creech
and
Carl Brown

Last Wednesday we stood beneath the statue of George Rogers Clark to make the point that we embrace the philosophy of conservation of limited resources, and made a pledge to reduce government spending, beginning with the Commissioners' office.

Today, we stand beneath the statue of Honest Abe Lincoln to emphasize something that will be a hallmark of our tenure in office: openness and candor.

Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal.

We are men enough to admit when we've made a mistake.

We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

This has to be one of the most ridiculous lines of court decisions we have ever seen. Why should it be illegal for us to promise that if elected we will cease being the only one of Kentucky's 120 counties which pays its part-time county commissioners the same amount of money as its full-time County Judge/Executive? Why should we not

be able to reduce government waste wherever we find it? Why shouldn't we be able to cut our own salaries? This appears to us to be a sweetheart deal with one group of politicians protecting other politicians. A classic "you scratch my back, I'll scratch yours."

However, being lawabiding citizens and being pledged to enforcing all laws, we do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law.

We regret having to take this action, but we regret even more the circumstances which led to this whole episode—Earl Hartlage doubling his salary shortly after his election.

While a political line of court cases may cause us a setback in this situation, we refuse to be sidetracked from the overriding issue—government wasting tax dollars. Time and time again we have seen Judge McConnell rebuffed in his efforts to reduce government spending. We are running to provide the citizens of this community an independent, but cooperative, Fiscal Court. We truly believe in our campaign slogan—"Progress Through Cooperation."

Commonwealth of Kentucky
County of Jefferson

Certificate of Election

We, the undersigned, duly authorized to canvass the returns of the County of Jefferson, do hereby Certify that at the General Election, held in said County on November 6, 1979 the following vote was tabulated for the office of County Commissioner - "C" District

Jefferson County Kentucky.

Earl J. Hartlage	83,675 Votes
Carl Brown	93,826 Votes

Carl Brown, having received the highest number of votes cast for the office of County Commissioner - "C" District was duly elected to fill the said office.

Witness our hands, this the 27th day of November 19 79, at Louisville, Kentucky.

Bremer Ehrler
Chairman, Jefferson County Board of Elections

James T. Stanfield
Republican Member

Walter L. Catalfo
Democratic Member

Joe Sherman
Sheriff, Jefferson County, Kentucky

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

clared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*

v.

CARL W. BROWN - - - - *Defendant-Contestee*

ANSWER

Comes the Defendant-Contestee, Carl W. Brown, by counsel, and for answer to the Petition herein states as follows:

FIRST DEFENSE

For specific answer to the Petition, Defendant-Contestee states:

1. Paragraph 1 of the Petition is admitted.

2. That he admits that on August 15, 1979, as part of a general platform plank criticizing the Plaintiff-Contestant's increase in salary throughout his term of office and the increased cost of operating the Jefferson Fiscal Court Commissioners' office, he did state to the public at large that he believed the salary paid the Plaintiff-Contestant for the limited duties performed by the Plaintiff-Contestant was too high and that Defendant-Contestee would not maintain the county commissioners' salary at that same level, but would serve for a salary within the confines prescribed by the Kentucky Constitution and the Kentucky Revised Stat-

utes; anything in Paragraph 2 inconsistent with the above is denied.

3. Paragraph 3 of the Petition is denied.

4. Paragraph 4 of the Petition is denied.

5. Paragraph 5 of the Petition is denied and Defendant-Contestee stated that the specific violations of the Plaintiff-Contestant are more particular set out in the following affirmative defenses.

6. With respect to Paragraph 6, Defendant-Contestee admits that Plaintiff-Contestant received more than 25% of the number of votes cast for Defendant-Contestee, but denies that Plaintiff-Contestant is duly qualified to contest the instant election by virtue of his violation of the Corrupt Practices Act as is more particularly hereinafter set out.

7. Paragraph 7 of the Petition is admitted.

SECOND DEFENSE

Defendant-Contestee affirmatively states that the statements made at a press conference on August 15, 1979 (a photostatic copy of the transcript of same is attached hereto as Exhibit A), did not constitute a violation of the Corrupt Practices Act in that:

A. The Defendant-Contestee made no promise to accept less than a sum within the range of salaries set by the Constitution and the statutes; and

B. There was no promise of financial obligation to any "person"; and

C. The statement was addressed to the public at large as opposed to any one entity or group of persons.

THIRD DEFENSE

In the alternative, if the statement made by Defendant-Contestee could be considered a minor technical violation

of the statute, it should still be no ground to void the election, because the Defendant-Contestee very promptly retracted the statement, and that retraction received greater publicity than the original statement (See statement dated August 19, 1979 attached hereto as Exhibit B).

FOURTH DEFENSE

The Plaintiff-Contestant has no standing to bring this action seeking to void the election of the Defendant-Contestee in that the Plaintiff-Contestant was himself guilty of violating the Corrupt Practices Act in at least the following instances:

A. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Greater Louisville Labor Council; and

B. He pledged to support a collective bargaining ordinance for county employees in return for the endorsement and support of the Department of Human Resources Employees Association; and

C. The sign or decal on a locomotive driven by the candidate or on his behalf throughout the campaign did not contain the required disclaimer language, to-wit: "Paid for by . . ."; and

D. The Plaintiff-Contestant, Earl J. Hartlage, failed to file copies of his pre-election and post-election reports of receipts and expenditures with the Jefferson County Court Clerk, which is mandatorily required under the Corrupt Practices Act.

FIFTH DEFENSE

That the Defendant-Contestee had the right to make the statement which was made on August 15, 1979, under the United States and Kentucky Constitutional provisions

guaranteeing the right of freedom of speech, equal protection of the laws and the provisions providing for free and equal elections; any application of any provisions of the Corrupt Practices Act which might tend to restrict the making of such statements by candidates for public office would be unconstitutional.

WHEREFORE, the Defendant-Contestee demands:

1. That the Petition seeking to void his election be dismissed;

2. That this case be accorded priority over all other cases pending in the division of this Court;

3. All other proper relief to which he may appear entitled.

Richard D. Remmers
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300
Counsel for Defendant-Contestee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served on Victor L. Baltzell, Jr., Counsel for Plaintiff-Contestant, 219 Marion E. Taylor Building, Louisville, Kentucky 40202, by hand-delivering a copy to him this 31st day of December, 1979.

Counsel for Defendant-Contestee

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

AMENDED ANSWER

Comes the Defendant, Carl W. Brown, by counsel, and for his first Amended Answer states as follows:

1. Defendant reaffirms and reiterates each and every allegation contained in his original Answer, as though set out verbatim herein.

2. As an additional defense, Defendant states that the Plaintiff, on or about February 23, 1979, accepted a campaign contribution in excess of $100.00, in the form of cash, in violation of the Kentucky Corrupt Practices Act.

WHEREFORE, Defendant demands the relief sought in his original Answer.

Henry S. Johnson
Handmaker, Weber & Meyer
2307 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-6300
Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered this 24th day of January, 1980, to Mr. Victor L. Baltzell, Jr., Attorney for Plaintiff, 219 Marion E. Taylor Building, Louisville, Kentucky 40202.

Henry S. Johnson

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer*, 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C" District encompasses an area generally referred to as the

southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provision of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations,

but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged

agreement concerned a commitment by Mr. Hartlage over collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd*, 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis*.

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in con-

sideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs*, 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating

of the office if a violation of this nature is found to exist. The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the

> conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

/s/ Richard D. Remmers
Counsel for Carl W. Brown
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300

Have Seen; Notice of Filing Waived:

/s/ Victor L. Baltzell, Jr.
Counsel for Earl J. Hartlage
200 Marion E. Taylor Building
Louisville, Kentucky 40202
589-2100

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra,* the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to consitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill*, *supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action npon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each indivdiual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin*, Ky., 350 S. W. 2d 161 (1961); *Sparks, supra*, and *Kluemper* v. *Zimmer*, 240 Ky. 225, 41 S. W. 2d 111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District*, Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action bas based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton*, Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

Attorneys for Appellant:

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL & STAMPER
219 Marion E. Taylor Building
Louisville, Kentucky 40202

Attorneys for Appellee:

RICHARD D. REMMERS
HANDMAKER, WEBER & MEYER
HENRY S. JOHNSON
R. MICHAEL PITT
2307 Citizens Plaza
Louisville, Kentucky 40202

OPINION RENDERED: OCTOBER 29, 1980
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

OPINION AND ORDER DENYING PETITION FOR REHEARING—Entered October 29, 1980

BEFORE: HOGGE, GUDGEL and VANCE, Judges.

GUDGEL, JUDGE. In his Petition for Rehearing the appellee contends that this Court has misconceived fifth amendment freedom of speech issues and overlooked recent decisions of the United States Supreme Court applicable thereto. Specifically, appellee relies upon *Consolidated Edison Co.* v. *Public Service Commission*, ____ U. S. ____, 48 USLW 4776 (June 20, 1980); *First National Bank* v. *Bellotti*, 435 U. S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); and *Buckley* v. *Valeo*, 424 U. S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), none of which were cited to this Court in his original brief.

The cases relied upon by appellant are not controlling when applied to the factual situation which is present in this case. Without question a state may not censor what a candidate for public office may say to the electorate. There is a compelling state interest, however, in the fairness and integrity of elections, and a state may require that elections be conducted free of corruption and bribery.

Our state has defined by statute what constitutes corruption in an election. It condemns an attempt to buy votes. Our highest court has specifically held that a promise by a candidate to take a reduction in the salary set by law for an elective office and a promise to discharge the duties of the office without pay is so vicious in its tendencies as to constitute a violation of the Corrupt Practices Act. The court's reasoning is premised on the belief that such a promise is an attempt to buy votes or to bribe the voters. *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960). We are bound by that decision. The refusal of this Court to follow precedent established by our Supreme Court would constitute nothing less than judicial anarchy.

The cases relied upon by appellee do not hold, and appellee does not go so far as to argue, that a state does not have a constitutional right to void an election for bribery simply because the offer of the bribe involved the use of speech. What appellee really argues is that the holding of *Sparks* v. *Boggs*, *supra*, is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v.

Boggs, supra, it must be addressed to a court which has the power to overturn or modify that decision.

The Petition for Rehearing is DENIED.

ALL CONCUR.

/s/ Paul D. Gudgel
Judge, Court of Appeals

ENTERED: October 29, 1980

Attorneys for Appellant:

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL & STAMPER
219 Marion E. Taylor Building
Louisville, Kentucky 40202

Attorneys for Appellee:

RICHARD D. REMMERS
HANDMAKER, WEBER & MEYER
HENRY S. JOHNSON
R. MICHAEL PITT
2307 Citizens Plaza
Louisville, Kentucky 40202

SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11393

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
No. 79-CI-11292

ORDER—Entered December 10, 1980

The appellee, having moved for immediate relief staying or recalling the mandate of this court issued or to be issued in the above-styled proceedings, and it appearing that the enforcement of such mandate should be stayed until a hearing can be held upon the motion, it is hereby ORDERED that the enforcement of the mandate of this Court be STAYED pending further orders of the Court. A hearing upon the motion will be held at 10:00 a.m., December 16, 1980, at the Central Office of the Court of Appeals, 403 Wapping Street, Frankfort, Kentucky.

(s) Roy N. Vance
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER.

The appellee, having moved for immediate relief staying or recalling the mandate of this Court which issued on December 10, 1980, in the above-styled proceedings, and the Court having heard argument of counsel, it appears that the enforcement of such mandate of this Court should be STAYED until March 9, 1981, and the Court being sufficiently advised, it is so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
No. 79-CI-11292

ORDER—Entered December 16, 1980

BEFORE: WILHOIT, VANCE, and WINTERSHEIMER, JUDGES.

This cause having come before the Court on motion for leave to substitute Fred M. Goldberg and Jonathan D. Goldberg, as counsel for the appellee herein, Carl W. Brown, and it appearing that the firm of Handmaker, Weber & Meyer, and the said Carl W. Brown have agreed to such motion, and the Court being otherwise sufficiently advised, it is hereby so ORDERED.

(s) Anthony M. Wilhoit
Judge, Court of Appeals

SUPREME COURT OF THE UNITED STATES

No. A-705 (80-1285)

CARL W. BROWN, - - - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - - *Respondent.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the mandate of the Court of Appeals of Kentucky, No. 80-CA-385-MR, be, and the same is hereby, stayed pending disposition of the pretition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

/s/ Potter Stewart

Associate Justice of the Supreme
Court of the United States

Dated this 18th day of February, 1981.